COURT OF APPEALS
DECISION
DATED AND FILED

May 25, 2004

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 03-2463-CR **Cir. Ct. No. 01CF000043**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT III

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MARY C. Z.,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Taylor County: DOUGLAS T. FOX, Judge. *Affirmed in part; reversed in part and cause remanded with directions*.

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. Mary C. Z. appeals a judgment of conviction entered upon a jury's verdict and an order denying her postconviction motions. Mary argues that there is insufficient evidence to support her conviction for reckless endangerment; that she was denied her right to a unanimous verdict on an

obstructing charge as well as the dangerous weapons enhancer of a charge for causing mental harm to a child; that the court should have conducted an in camera review of the victim's mental health records; and that her trial counsel ineffectively pursued these arguments. We agree that there is insufficient evidence to sustain the reckless endangerment conviction and reverse the portion of the order denying relief. We remand the case with directions to vacate the conviction and dismiss the charge. However, we disagree with Mary's other arguments and affirm the remaining portions of the judgment and order.

Background

¶2 The events in this case took place in March 2001. Mary and her husband James lived with their four children. The oldest, Annie, was seventeen. At trial, Annie testified that on March 20, she came home from school and had an argument with Mary because Mary had confiscated her makeup. Annie went to her bedroom and kicked out the window. Annie admitted that when Mary came to check on the commotion, Annie "took her down" and threatened Mary with a piece of the broken glass until James intervened. Annie claimed that during this incident, Mary stabbed her with scissors. Annie then claimed that after James rescued Mary, Mary returned to the room with a gun, pointing it at Annie and pulling the trigger. The gun did not fire; it was apparently unloaded.

¶3 Mary explained that after Annie broke the window, James had given Annie a bucket and a roll of plastic to clean up the glass and cover the window. When Mary went to check on her, Annie became agitated, threatening to cut her own wrist with the broken glass. When Mary tried to take the glass away, Annie, who had a history of cutting herself, pulled Mary down and threatened her with the glass. At trial, Mary denied stabbing Annie with the scissors and James stated

he never saw Mary with the gun. Mary also denies she ever used the gun on Annie.

¶4 While Annie was questioned about a different matter at school on March 21, she made allegations concerning the previous night's events. Annie acknowledged to the investigators that she had broken the window and threatened Mary with the glass but claimed Mary stabbed her with the scissors and pointed a gun at her. Consequently, sheriff's investigator Lisa Kauffman and human services case worker Kathy Tingo went to the home to investigate.

¶5 Mary repeated to the officers that she and Annie fought about the makeup, that Annie broke the window, and then held Mary down while threatening her with the glass until James intervened. The three younger children arrived home and the officers interviewed them. Their accounts generally mirrored Mary's. However, the younger daughter, Jennifer, stated that Mary looked for shotgun shells and said she was going to fool Annie by pointing the unloaded gun at her. Jennifer later testified that she never saw Mary with the gun, but Annie told her to say Mary had pointed it at Annie.

¶6 After speaking with the children, the officers arrested Mary. Tingo searched the bathroom, finding a shotgun under a pile of clothes. Mary previously denied to the investigators that any guns were in the home. She stated that the family owned two guns, but both were locked in the garage. Mary said James had the only key to the garage and he was in Nekoosa. According to the officers, after Mary was arrested, she then said James was in the garage, where he was found hiding.

¶7 Mary later stated that the guns were usually stored in the garage and she had forgotten the guns had been moved into the home the previous year. She

also testified that she told officers James was in the garage after she heard the garage door. James testified he had in fact left, planning to go to Nekoosa, but he did not make the trip. When he returned home, he noticed multiple vehicles at his home, including a squad car, so he drove in and locked himself in the garage. To his knowledge, Mary did not know he had returned.

¶8 Mary was charged with seven offenses: (1) physical abuse of a child, with a dangerous weapons enhancer; (2) first-degree reckless endangerment, with a dangerous weapons enhancer; (3) causing mental harm to a child, with a dangerous weapons enhancer; (4) pointing a firearm at another; (5) disorderly conduct; (6) obstructing an officer; and (7) resisting an officer. A jury convicted Mary of first-degree reckless endangerment, with the weapons enhancer; causing mental harm to a child, with the weapons enhancer; disorderly conduct; and obstructing an officer. It acquitted her on the remaining charges.

¶9 Mary filed a postconviction motion, arguing there was insufficient evidence to support a conviction for first-degree reckless endangerment and that the jury should have been instructed on the lesser-included second-degree offense. She further argued that the court should have conducted an in camera review of Annie's mental health records and that her due process rights were violated because the jury was not given a unanimity instruction on the obstructing charge. Finally, Mary contended that trial counsel was ineffective by failing to pursue these arguments. The trial court ultimately agreed that counsel was ineffective for failing to seek the lesser-included instruction and reversed the conviction, granting Mary a new trial on the reckless endangerment charge. However, the court declined to vacate the conviction and dismiss the charge. The court denied the remainder of Mary's motion. Mary appeals.

Discussion

Sufficiency of the Evidence

¶10 Mary argues her conviction for first-degree reckless endangerment should be dismissed, not simply retried, because the State cannot fulfill its evidentiary burden. Indeed, the State pointed out both in its opening argument to the jury and at sentencing that the gun was unloaded. The State further concedes that while an unloaded gun is a dangerous weapon, it did not and cannot meet its burden of proving that Mary created a risk of death or harm, even in a new trial. Thus, it does not object to Mary's request to have the charge dismissed.

¶11 When reviewing the sufficiency of the evidence to support a conviction, this court may not disturb the verdict unless the evidence, viewed most favorably to the State and the conviction, is so lacking in probative value that no reasonable trier of fact could have found guilt beyond a reasonable doubt. ***State v. Zimmerman***, 2003 WI App 196, ¶24, 266 Wis. 2d 1003, 669 N.W.2d 762. However, whether the facts fulfill the legal elements of the offense is a question of law for us to review de novo. *See* ***State v. Forster***, 2003 WI App 29, ¶12, 260 Wis. 2d 149, 659 N.W.2d 114.

¶12 Once an appellate court determines there is insufficient evidence to sustain a conviction, the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution precludes that court from ordering the defendant be retried. ***State v. Ivy***, 119 Wis. 2d 591, 608, 350 N.W.2d 622 (1984). "Since we necessarily afford absolute finality to a jury's *verdict* of acquittal … it is difficult to conceive how society has any greater interest in retrying a defendant when, on review, it is decided as a matter of law that the jury could not have properly

returned a verdict of guilty." ***Id.*** at 609 (citing ***Burks v. United States***, 437 U.S. 1, 16 (1978)).

¶13 WISCONSIN STAT. § 941.30(1) reads:[1] "FIRST-DEGREE RECKLESSLY ENDANGERING SAFETY. Whoever recklessly endangers another's safety under circumstances which show utter disregard for human life is guilty of a Class F felony." Recklessness requires the creation of an objectively unreasonable, substantial risk of human death or great bodily harm and the actor's subjective awareness of the risk. ***State v. Blair***, 164 Wis. 2d 64, 70, 473 N.W.2d 566 (Ct. App. 1991). Mary argues that the evidence at trial shows only that the shotgun was unloaded, and that because the gun was unloaded, she could not have created a risk of death or harm.

¶14 In reviewing Mary's postconviction motion, the court stated:

> Evidence was presented from which the jury could determine that the defendant looked for ammunition and in fact found ammunition. … The jury might well have concluded that the defendant did find ammunition and load the gun but that … the gun malfunctioned or it was loaded improperly.

The court additionally noted that, loaded or not, Mary still was using a dangerous weapon because the enhancer statute considers even an unloaded gun to be dangerous.[2]

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[1] All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

[2] WISCONSIN STAT. § 939.63 provides enhanced penalties for someone who "commits a crime while possessing, using or threatening to use a dangerous weapon …." WISCONSIN STAT. § 939.22(10) defines a dangerous weapon as

(continued)

¶15 Although we are not necessarily bound by the parties' concessions of law, ***Fletcher v. Eagle River Mem'l Hosp. Inc.***, 156 Wis. 2d 165, 177, 456 N.W.2d 788 (1990), it is also inappropriate for this court to abandon its neutrality to craft a substantive argument for either side. ***State v. Gulrud***, 140 Wis. 2d 721, 730, 412 N.W.2d 139 (Ct. App. 1987). In light of the State's concession, therefore, we accept Mary's argument that there is insufficient evidence to convict her on a reckless endangerment charge.[3] The conviction must be vacated and the charge dismissed.

Unanimous Verdict, Obstruction Charge

¶16 Mary complains that she was denied the right to unanimity on the obstruction charge. We disagree. The Wisconsin constitutional guarantee to a trial by jury includes the right to a unanimous verdict on the ultimate issue of guilt or innocence. ***State v. Derango***, 2000 WI 89, ¶13, 236 Wis. 2d 721, 613 N.W.2d 833. The principal justification for unanimity is ensuring each juror is convinced beyond a reasonable doubt that the prosecution has proven each element of the offense. ***Id.***

¶17 Obstruction includes knowingly giving false information to the police. *See* WIS. STAT. §§ 946.41(1) and (2)(a). There was evidence that Mary

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> any firearm, whether loaded or unloaded; any device designed as a weapon and capable of producing death or great bodily harm; any electric weapon, as defined in s. 941.295(4); or any other device or instrumentality which, in the manner it is used or intended to be used, is calculated or likely to produce death or great bodily harm.

[3] Mary also points out, and we tend to agree given the facts of this case, that a reckless endangerment conviction seems inconsistent given that she was acquitted of pointing the gun.

lied to the police twice: once when she told them there were no guns in the house when in fact the shotgun was in the bathroom, and once when she told them her husband was in Nekoosa when he was really in the garage. She complains she was denied unanimity because some jurors could have based their conviction on her gun statement while some could have based the conviction on her statement concerning James' whereabouts. She also argues that each lie could have been charged separately and, if that had happened, there would have to be unanimity on each charge.

¶18 A unanimity instruction is necessary only if the various separate acts alleged as alternative methods of commission are conceptually distinct. ***State v. Lomagro***, 113 Wis. 2d 582, 592, 335 N.W.2d 583 (1983); *and see* ***United States v. Gipson***, 553 F.2d 453, 458 (5th Cir. 1977).[4] Applying this test requires an examination for conceptual similarity between acts, not their dissimilarity. ***Lomagro***, 113 Wis. 2d at 593. Conceptually similar charges need not be separated and will not require a unanimity instruction.

¶19 We conclude that Mary's right to unanimity was not violated because her lies were conceptually similar. That is, her "behavior constituted one continuous course of conduct" aimed at thwarting the law enforcement officers' efforts at locating evidence relating to the evening's altercations. *Cf.* ***id.*** at 593

[4] We question whether the conceptual similarity test is the correct one to apply. *See* ***State v. Norman***, 2003 WI 72, ¶62, 262 Wis. 2d 506, 664 N.W.2d 97 (noting the United States Supreme Court adopted a new test of fundamental fairness and rationality). However, neither side discusses ***Norman*** and instead both focus on the "conceptually distinct" line of cases. The court in ***Norman*** rejected a unanimity challenge because the defendant failed to discuss the appeal in terms of the rule. ***Id.***, ¶63. Thus, if ***Norman*** did apply, we would reject the unanimity argument for failure to provide the correct analysis. Moreover, even applying the fundamental fairness test, we would remain unconvinced of any constitutional violation.

(penis-vagina intercourse and fellatio were part of "one continuous carnal invasion" of victim), and ***State v. Giwosky***, 109 Wis. 2d 446, 451, 326 N.W.2d 232 (1982) (defendant committed battery either by throwing a piece of wood or by engaging in physical altercation, but both acts were "behavior constitut[ing] one continuous course of conduct" and no unanimity instruction was needed).

¶20 Here, the question is only whether Mary gave false information to police, not what the false information was. *Cf.* ***Giwosky***, 109 Wis. 2d at 451 ("under the facts of this case unanimity requires that the entire jury agree that the defendant intentionally committed *an act* …. No agreement is required as to *which act* constituted battery because it was a continuous act."). Mary's two allegedly false statements to the officers were part of one continuous course of conduct, transpiring in a relatively short period of time, designed to hinder an investigation. A unanimity instruction was not required.

Unanimity Instruction, Weapons Enhancer

¶21 Mary argues she was denied a unanimous verdict on the causing mental harm to a child charge. It was charged with a weapons enhancer, and Mary claims the jury could have decided either that the scissors or the gun was the dangerous weapon without agreeing on which was used.

¶22 We disagree. The record indicates that both the prosecution and the defense took care to separate the events and the corresponding weapons. The scissors was discussed only relative to the physical abuse charge, while the gun was discussed in the mental harm charge.

¶23 Moreover, the charged jury instructions reveal this separation. The pattern instruction for the dangerous weapons enhancer, WIS JI—CRIMINAL 990,

suggests the court use the statutory definition of dangerous weapon as part of the instruction. This definition, in WIS. STAT. § 939.22(10), includes "any firearm, whether loaded or unloaded [or] any device designed as a weapon and capable of producing death or great bodily harm."

¶24 When the court gave the enhancer instruction for the physical abuse charge on the record, it did not read the firearm portion of the definition. On the written copy that the court sent with the jury, the complete statutory language appears to have been printed initially, but the firearm language is first crossed out in ink and then has white correction fluid over it. This makes clear that the gun was not to be considered the weapon for the physical abuse charge.

¶25 For the enhancer instruction on the mental harm charge, the definition the court gave included the firearm language, as did the written copy. Jury instructions are considered as a whole, not judged in isolation. ***Ivy***, 119 Wis. 2d at 603. Presented with the two oral instructions, the written instructions containing appropriately altered definitions of a dangerous weapon, and armed with arguments of counsel, we are confident the jury knew it was considering whether the gun, not the scissors, was the weapon allegedly used in committing the mental harm. There was no unanimity violation.

In Camera Review of Annie's Mental Health Records

¶26 Mary argues the trial court should have conducted an in camera review of Annie's mental health records to determine whether they could be released for Mary to use in her defense. "The defendant bears the burden of making a preliminary evidentiary showing before an in camera review is conducted by the court." ***State v. Green***, 2002 WI 68, ¶20, 253 Wis. 2d 356, 646 N.W.2d 298. Any factual findings the court makes in its determination are viewed

under the clearly erroneous standard. ***Id.*** However, whether the defendant's showing was sufficient implicates the constitutional right to a fair trial, raising a question of law for us to review de novo. ***Id.***

¶27 The preliminary showing for an in camera review requires a defendant to set forth a good faith, specific factual basis that demonstrates a reasonable likelihood the records contain noncumulative, relevant information necessary to a determination of guilt or innocence. ***Id.***, ¶34. Information is "necessary to a determination of guilt or innocence" if it "tends to create a reasonable doubt that might not otherwise exist." ***Id.*** (citation omitted).

¶28 The test requires the court to look at existing evidence, in light of the request, and determine whether the record will likely contain independently probative evidence. ***Id.*** The defendant must "clearly articulate how the information sought corresponds to his or her theory of defense." ***Id.***, ¶35.

¶29 Here, the court determined that Mary had no specific factual basis demonstrating independent, noncumulative evidence because there had been testimony from various witnesses about Annie's mental health. Mary complains that this testimony came mainly from her and James, so the jury would likely view it as self-serving. However, this ignores the record which demonstrates that a social worker, a child protective services worker, and Annie herself gave testimony about her mental health.

¶30 Mary argues first that the records were necessary to ascertain Annie's mental condition prior to the date of the offense because the only way to assess mental harm is to compare Annie before and after the alleged harm. We disagree. The social worker, who had been working on Annie's case for a year prior to the incident, testified that Annie's mental state changed and that her

medications needed to be altered. The child protective services worker, who had known Annie for eleven years, testified similarly. Mary fails to explain what exculpatory, noncumulative evidence would likely be available in the records to contradict this testimony.

¶31 Mary then argues the records are necessary to demonstrate Annie's history of cutting herself as potentially exculpatory relative to the claim that Mary stabbed her with the scissors. However, Annie actually testified that she engaged in that behavior. The mental health records were not necessary to prove what the victim admitted. Mary further suggests this cutting behavior "may provide an independent motive" for Annie to fabricate a claim that Mary stabbed her as a way of deflecting attention from her own behavior and to avoid recommitment at Mendota. However, Mary offers no explanation as to how anything in the mental health records would demonstrate this motive. Indeed, this theory likely could have been explored on cross-examination of Annie, without use of the health records.

¶32 Prior to trial, Annie was acquitted of a criminal charge after she was found not guilty by reason of mental disease or defect (NGI). Mary wanted the records relative to Annie's defense, claiming that the NGI verdict casts doubt on Annie's ability to perceive events accurately and that the records might suggest a motive. However, an NGI defense does not necessarily mean an individual has difficulty perceiving reality, and there is no specific allegation of what exculpatory nonduplicative information would be in Annie's records. We cannot permit a fishing expedition based on Mary's hope that she might find something.

¶33 Finally, Mary argues that the records are necessary for demonstrating other acts to show Annie was the first aggressor. Evidence of other

acts is not admissible to prove the character of a person to show the person acted in conformity therewith. WIS. STAT. § 904.04(2). Moreover, we are not entirely convinced the other acts evidence would be admissible under an exception. Past acts may be admissible when a defendant claims self-defense, but Mary denied any of the charged events even happened. Thus, evidence of Annie's aggressive character or past violent act would probably be inadmissible. *See* ***State v. Head***, 2002 WI 99, ¶¶120-23, 255 Wis. 2d 194, 648 N.W.2d 413. While Mary wants to show that Annie was the "first aggressor," the only statutory exception for that allows the State to offer evidence of a *homicide* victim's character of peacefulness if the accused claims the victim was the first aggressor. *See* WIS. STAT. § 904.04(1)(b).

¶34 Mary claims the prior aggressive acts show Annie's intent to initiate a physical confrontation. We are unpersuaded. At best, these prior acts would show Annie's propensity to fight, not a motive for the fight. Moreover, there is still no allegation of any information different from what was already offered in evidence. Mary has not established a reasonable likelihood that the mental health records would reveal evidence not already known. The trial court correctly concluded Mary had failed to allege a sufficiently specific factual basis demonstrating that independently probative, noncumulative evidence would be in Annie's mental health records.

Ineffective Assistance of Counsel

¶35 Mary argues trial counsel was ineffective for failing to raise either unanimity issue and failing to better specify the health records she sought. To establish ineffective assistance, Mary would have to show that counsel's performance was not within the range of competence demanded of attorneys in

criminal cases, and that the deficient performance affected the outcome of the case. *See* ***State v. Pitsch***, 124 Wis. 2d 628, 633-34, 369 N.W.2d 711 (1985). Because we conclude there is no error in any of Mary's claims, there can be no prejudice, so counsel was not ineffective.

Conclusion

¶36 Because the State concedes it cannot meet its evidentiary burden to prove reckless endangerment, we reverse the portion of the order denying relief relative to that charge, and remand this case to the trial court with directions to vacate Mary's conviction on and dismiss the charge of first-degree reckless endangerment with the dangerous weapon enhancer. The remaining portions of the judgment and order are affirmed.

By the Court.—Judgment and order affirmed in part; reversed in part and cause remanded with directions.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.